

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Debra V. Schutter; Sidney J. Schutter

OBJECTOR: State of Montana Board of Land Commissioners

CASE 41H-0243-R-2021
41H 13169-00

ORDER ON MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case addresses whether the State of Montana, Board of Land Commissioners (the “State”) should be added as a co-owner of a water right claim with a point of diversion on private land and a place of use that is a mix of private land and State school trust land. In *Mont. Dep’t of State Lands v. Pettibone*, 216 Mont. 361, 302 P.2d 948 (1985) (“*Pettibone*”), the Montana Supreme Court held the State owns water rights developed and put to beneficial use on school trust land, even if the place of use is leased to a private party. The State argues *Pettibone* applies to the facts of this case and moves for summary judgment. Debra V. Schutter and Sidney J. Schutter (“Schutters”), the decreed owners of claim 41H 13169-00, oppose the motion. The Schutters argue *Pettibone* does not apply, and they are the sole owners of the claim even though part of the place of use is State school trust land.

UNDISPUTED FACTS

1. The Water Court included claim 41H 13169-00 in the Preliminary Decree for the Gallatin River basin (Basin 41H). The preliminary decree abstract describes the claim as a use right to irrigate land from a groundwater well with an August 10, 1960 priority date. The preliminary decree abstract identifies the Schutters as the sole owners of the claim.

2. The abstract describes the following place of use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	160.00		SE	28	1N	3E	Gallatin
2	160.00		SW	28	1N	3E	Gallatin
3	160.00		NW	33	1N	3E	Gallatin
4	50.00		NE	33	1N	3E	Gallatin

3. The State owns place of use no. 2, the southwest quarter of Section 28, Township 1 North, Range 3 East (the “State parcel”). The State parcel is school trust land. (Declaration of Dennis Meyer¹ (“Meyer Decl.”), ¶ 3). The Schutters do not claim an ownership interest in the State parcel. (Declaration of Aislinn W. Brown² (“Brown Decl.”), Ex. A, Answer to Request for Admission No. 3.).

4. The State does not claim ownership in the remainder of the place of use decreed in the Preliminary Decree as owned by the Schutters, which consists of place of use id. no. 1 (160.00 acres), no. 3 (160 acres), and no. 4 (50 acres).

5. The preliminary decree abstract describes the point of diversion as a groundwater well located on the NWSESE of Township 1 North, Range 3 East, which is not within the State parcel.

6. The General Land Office (“GLO”) survey that includes what is now the State parcel was accepted on November 18, 1868. (Meyer Decl., ¶ 4).

¹ The State filed the Declaration of Dennis Meyer in support of its motion for summary judgment. (Doc. 22.00). The declaration includes six exhibits, labeled as Exhibits A through F.

² The State filed the Declaration of Aislinn W. Brown in support of its motion for summary judgment. (Doc. 21.00). The declaration provides foundation for discovery responses attached to the declaration.

7. The State acquired the State parcel from the United States on March 18, 1889. (Brown Decl., Ex. A; Meyer Decl., ¶ 5).

8. Sid Schutter leases the State parcel pursuant to the terms of a Cash Lease Agreement dated July 11, 2018. (Meyer Decl., Ex. F). The lease terminates on February 28, 2029. The lease states that it supplements and incorporates by reference the terms of a prior lease.

9. The State does not receive separate compensation for water used on the State parcel, though it does receive compensation for crops grown on irrigated state land pursuant to the lease agreement.

10. The Preliminary Decree abstract for claim 41H 13169-00 does not include any issue remarks. The claim received a single objection from the State. The State objected to the ownership element of the claim.³ The State's objection states:

Pettibone applies. POU 2 is located on State land and as the source is a well on private property[.] MSBLC/TLMD asks to be added as co-owner rather than having an implied claim generated. The POU was acquired for the Territory of Montana on 3/18/1889 and the GLO survey was accepted 11/18/1868. The priority date of this claim is 8/10/1960.

11. Additional facts are discussed below as necessary.

PROCEDURAL BACKGROUND

The State moved for summary judgment, asking the Court to resolve the State's objection by adding it as a co-owner of water right claim 41H 13169-00. (Doc. 20.00). The Schutters responded (Doc. 23.00) and the State replied (Doc. 24.00). The Schutters requested oral argument, which the Court granted. Oral argument took place via Zoom on March 28, 2023. Following oral argument, the Schutters filed an unopposed request to submit supplemental briefing, which the Court also allowed. The parties each filed post-

³ During summary report review, the Water Court also noted a priority date objection based on the reference to priority date in the text of the objection. Both ownership and priority date were identified on the objection list. This was incorrect because the priority date referenced in the objection is the same as what the Court decreed. The State's priority date reference in its objection apparently was made to support its *Pettibone* ownership objection. The State does not challenge the decreed priority date in its motion.

hearing briefs. (Doc. 30.00 (Schutters) and Doc. 31.00 (State)).

ISSUE

Should the Court add the State as a co-owner of water right claim 41H 13169-00 where the State owns part, but not all, of the place of use, and the State does not own the point of diversion?

DISCUSSION

A. Objection and Summary Judgment Standards.

As the objector, the State bears the burden of proving an element of the claim is incorrect. Rule 19, W.R.Adj.R. The State seeks to meet its burden through its motion for summary judgment challenging the ownership element of the claim 41H 13169-00, as decreed solely to the Schutters in the Preliminary Decree.

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M.R.Civ.P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. The parties agree the State’s motion does not raise issues of material fact. The question of whether the State is entitled to summary judgment as to its objection therefore is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

B. Application.

The State’s motion asserts it must be included as a co-owner of claim 41H 13169-00 under *Pettibone* because the State was the legal owner of a portion of the place of use as of the August 10, 1960 priority date. *Pettibone* arose out of the Water Court’s issuance of a final decree for the Powder River Basin. In the decree, the Water Court adjudicated ownership of water rights developed on State land in the name of the lessee, not the State. The Supreme Court reversed, holding that adjudicating ownership of water rights on school trust land to the lessees diminished the value of the lands and violated the State's obligations to the school trust. *Pettibone*, 216 Mont. at 371-373; *see also, Advocates for*

Sch. Tr. Lands v. State, 2022 MT 46, ¶ 30, 408 Mont. 39, 52, 505 P.3d 825, 834 (explaining *Pettibone* holding).

Pettibone involved several categories of water rights, but all fell within the same question addressed by the Supreme Court: “Who is the owner of a water right diverted or developed on school trust land; the State or the lessee?” *Pettibone*, 216 Mont. at 368. The question framed by the Supreme Court in *Pettibone* did not specifically address ownership of groundwater rights where a well’s point of diversion is on private land and the place of use includes both private land and land a private party leases from the State. The Schutters argue this factual difference is significant and requires a different outcome. The State responds that the Schutters’ position is inconsistent with *Pettibone* and years of subsequent precedent.

The Schutters cite two cases in their response brief to support their position. First, they cite *In re Huckaba Ranch, Inc.*, Case 41G-3, 2005 Mont. Water LEXIS 1, for the proposition that a water right does not become appurtenant to land owned by the appropriator unless “(1) the appropriator obtains title to the land; (2) the water right is conveyed to the owner of the land, or (3) the facts and circumstances indicate that the appropriator intended to make the right appurtenant to the land.” *Huckaba*, at *12. The Schutters’ selective quotation ignores the Water Court’s conclusion in *Huckaba* that these general concepts do not apply to water rights covered by *Pettibone*. The remainder of *Huckaba*, which the Schutters do not discuss, consists of the Water Court’s analysis and determination that *Pettibone* did apply to the facts in that case, so the Schutters’ citation is an incomplete statement of law and mostly dicta.

Next, the Schutters cite the Water Court’s decision in *In re Shields River Basin*, Case 43A-A, 2000 Mont. Water LEXIS 1 (“*Shields River*”). *Shields River* involved the adjudication of a water right owned solely by a private party, with a point of diversion on private land and a place of use on both private land and land owned by the State. The State objected to ownership based on *Pettibone*. The claimant moved to amend the place of use to remove the State land. The State again objected, also based on *Pettibone*. The Court rejected the State’s position because the water right previously had been decreed

by the district court as a private water right for use on private land, and was only temporarily used on State land. Based on these facts, the Water Court concluded *Pettibone* did not apply and denied the State's objections. *Shields River*, ¶ 45.

Shields River is distinguishable. The water right claim at issue previously was decreed by a district court as a private (non-State) right perfected with a place of use on private land. There was no privity of title between the decreed private right and the State land, meaning no one ever severed and conveyed the water right to the State land. The use on State land was only temporary and occurred sometime after the claim was decreed.

In contrast, claim 41H 13169-00 is decreed as appurtenant to both the Schutters' private land and State school trust land. The claim relies on State school trust land to put the full measure of the water right to beneficial use. A portion of the State parcel is used to maintain the claim. The Schutters are not seeking to omit the State parcel from the place of use, as the water right claimant did in *Shields River*. There also is nothing to suggest the Schutters are only temporarily using water on State land that was previously decreed as appurtenant to only private land. Instead, claim 41H 13169-00 is a single water right appurtenant to both private land and State school trust land. The Schutters benefit from having State parcel as part of the place of use. Under these facts, ownership of claim 41H 13169-00 is more akin to the rule in *Pettibone* than *Shields River*.

Even though the Schutters do not cite any controlling precedent to support their position, they are correct that *Pettibone* involved ownership of water rights with points of diversion on State land. *Pettibone* did not specifically address water right claims where the person who owns or controls the point of diversion seeks a water right that includes both private land and State school trust land as the place of use. However, *Pettibone* also did not hold that the categories of water rights it addressed were exclusive. Thus, whether *Pettibone* applies to the Schutters' specific situation requires a bit more analysis.

Montana common law recognized the right of an appropriator to develop a water right on land owned by a third party. *E.g.*, *Smith v. Denniff*, 24 Mont. 20, 28, 60 P. 398, 401 (1900); *Popham v. Holloron*, 84 Mont. 442, 446, 275 P. 1099, 1100 (1929). In

Pettibone, however, the Supreme Court recognized a different rule applies to water rights appurtenant to school trust land owned by the State. The Supreme Court looked to the nature of the State’s ownership of school trust land. Based upon the principles of school trust land that flow from how the State acquired and holds the land from the federal government for the benefit of the school trust, *Pettibone* concluded the land and all appurtenances are part of the corpus of the trust. As such, “an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest.” *Pettibone*, 216 Mont. at 371.

Even though *Pettibone* did not specifically address the situation where the State owns part of the place of use but not the point of diversion, the water right ownership conclusion does not change. A water right is appurtenant to the place where it is put to beneficial use – the place of use. *In re Quigley*, 2017 MT 278, ¶ 16, 389 Mont. 283, 287, 405 P.3d 627, 631; *Leggat v. Carroll*, 30 Mont. 384, 387, 76 P. 805, 807 (1904) (“a water right is appurtenant to the land upon which it is used”). *Pettibone* is grounded on the notion that where a water right is appurtenant to State school trust land, water right ownership only can be severed from the State land when the State receives separate compensation for the water right.

Based on the *Pettibone* analysis, it does not matter whether the Schutters own the point of diversion and part of the place of use. The undisputed facts indicate the Schutters put water to beneficial use on State school trust land without separately compensating the State. Putting the water to beneficial use on the State parcel and claiming the land as part of the place of use makes the water right appurtenant to State school trust land. A water right appurtenant to school trust land, even in part, triggers State ownership under *Pettibone*. Were that not the case, the Schutters would be using a portion of the corpus of the school trust without compensating the State, a result *Pettibone* forbids.

During oral argument, the Court posed to the parties the hypothetical question of what would happen to a water right owned by a lessee of State land upon termination of the lease. The Schutters responded by arguing that upon lease termination, a claimant leasing State school trust land must either (1) file a change application, or (2) sell the

“subject water” to the successor lessee. (Doc. 30.00, at 1-2). The Schutters cite Title 77 of the Montana Code for authority. Specifically, they cite § 77-1-134, MCA for the proposition that a terminated lessee may retain title to water rights upon lease termination. The code section they cite only applies to structures on the beds of navigable rivers and streams. It says nothing about water rights using groundwater as a source, which is the case here.

The Schutters also cite § 77-6-302, MCA, which addresses “improvements” at lease termination. That section likewise is inapplicable because “improvements” consist of “fences, cultivation, improvement of the land itself, irrigation ditches, sheds, wells, reservoirs, and similar improvements.” Section 77-6-301, MCA, The statute does not address water rights, likely because water rights are an appurtenance, not an improvement. *See Ophus v. Fritz*, 2000 MT 251, ¶ 33, 301 Mont. 447, 455, 11 P.3d 1192, 1197 (distinguishing “appurtenances” from “improvements”).

Lastly, the Schutters argue § 85-2-306, MCA prohibits the State from appropriating groundwater water rights unless the State also has “exclusive property rights in the groundwater development works.” (Doc. 30.00, at 4, quoting statute). The statute the Schutters cite is part of the permit provisions applicable to post-July 1, 1973 water rights. It has no applicability to the adjudication of existing rights. Section 85-2-301, MCA. The Schutters provide no other argument in their post-hearing brief to undercut the conclusion that *Pettibone* applies to this case.

The State suggests two alternatives in its post-hearing response. First, the State suggests an information remark noting that the State’s ownership is limited to POU no. 2. This suggestion is well-taken, as it clarifies why the parties are listed as co-owners of the claim. The Court will add an information remark pursuant to its authority under § 85-2-234(6)(i), MCA.

Next, the State offers an alternative resolution to create a separate implied claim for POU no. 2. The Court declines to accept this suggestion because the State’s objection specifically says it “asks to be added as co-owner rather than having an implied claim generated.” The State did not move to amend its objection, nor has it moved to have an

implied claim generated. Additionally, the State also made this suggestion in its prior briefing (Doc. 24.00, at 3) and the Schutters did not respond to it, so the suggestion does not have consent from all parties. While an implied claim might be appropriate in certain analogous situations, it is not necessary for the State to prevail on its summary judgment motion. The State met its burden without the need for an implied claim, and the State's motion should be granted.

ORDER

THEREFORE it is ORDERED that the State's motion for summary judgment is GRANTED, the State's objection is resolved, and this case is closed. The State is added as a co-owner of claim 41H 13169-00 and the following information remark is included on the post-decree abstract:

THE OWNERSHIP OF THE MONTANA STATE BOARD OF LAND
COMMISSIONERS IS LIMITED TO POU NO. 2.

A post-decree abstract is included with this Order to confirm the modifications have been made in the State's centralized water rights record system.

ELECTRONICALLY SIGNED AND DATED BELOW

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 13169-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

SIDNEY J SCHUTTER
3131 WOODEN SHOE RD
MANHATTAN, MT 59741 8145

DEBRA V SCHUTTER
3131 WOODEN SHOE RD
MANHATTAN, MT 59741 8145

Priority Date: AUGUST 10, 1960

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 4.46 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 530.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSESE	28	1N	3E	GALLATIN

Period of Diversion: APRIL 15 TO OCTOBER 25

Diversion Means: WELL

Period of Use: APRIL 15 TO OCTOBER 25

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	160.00		SE	28	1N	3E	GALLATIN
2	160.00		SW	28	1N	3E	GALLATIN
3	160.00		NW	33	1N	3E	GALLATIN
4	50.00		NE	33	1N	3E	GALLATIN

Total: 530.00

THE OWNERSHIP OF THE MONTANA STATE BOARD OF LAND COMMISSIONERS IS
LIMITED TO POU NO. 2.